

STATE OF WISCONSIN
Department of Commerce

In the Matter of the PECFA Appeal of

Dennis Budd
Budds Standard Inc
2422 Monroe St
Madison WI 53711-1905

PECFA Claim #53711-1905-22
Hearing #00-928

Final Decision

PRELIMINARY RECITALS

Pursuant to a petition for hearing filed September 13, 2000, under §101.02(6)(e), Wis. Stats., and COMM 47.53, Wis. Adm. Code, to review a decision by the Department of Commerce, a hearing was commenced on November 8, 2001, at Madison, Wisconsin.

The issue for determination is: **Whether the department's decision dated June 10, 2000 was correct with regard to the disputed costs identified in petitioner's appeal received by the department on September 13, 2000.**

There appeared in this matter the following persons:

PARTIES IN INTEREST:

Department of Commerce
PECFA Bureau
201 West Washington Avenue
PO Box 7838
Madison WI 53707-7838

By: Warren E. Bohlman
Department of Commerce
201 W. Washington Ave.
PO Box 7838
Madison WI 53707-7838

The appellant, Mr. Dennis Budd, did not appear at the hearing. No other representative of the appellant was present at the hearing. U.S. Mail sent notice of the hearing to Mr. Budd on October 10, 2001, at the following address:

Dennis Budd
Budds Standard Inc
2422 Monroe St
Madison WI 53711-1905

The authority to issue a final decision in this matter has been delegated to the undersigned by order of the Acting Secretary dated October 10, 2001.

At the hearing Mr. Warren Bohlman, appearing on behalf of the department, made the following motions:

That the matter be dismissed based upon the appellant's failure to file an appeal in a timely manner as set forth in COMM 47.53(1)(b)(b)(emergency rule).

That the matter be dismissed based upon the appellant's failure to appear at the hearing.

The matter now being ready for decision, I hereby issue the following

FINDINGS OF FACT

The appellant, Dennis Budd, operates a gas station on the subject site. The appellant submitted his claim for reimbursement for the costs he incurred in the remediation of the petroleum-contaminated site in question in the amount of \$178,788.28. Of that amount \$829.85 was denied by the Wisconsin Department of Commerce (department), which was responsible for administering the PECFA program, in a letter entitled Breakdown of PECFA Costs dated June 10, 2000 and sent to the appellant. The appellant submitted an appeal that was received by the department on September 13, 2000 for the following items: Right of Entry fee charged by the City of Madison (\$800.00). The appellant did not appeal the denial of the remainder of \$29.85 associated with charges in excess of state lodging rates.

The appellant did not appear at the hearing. Documents previously filed in this matter show that Attorney Kelly Cochrane of the department originally filed a Motion to Dismiss for Untimeliness on September 15, 2000. On October 10, 2000, the appellant submitted objections to this Motion. The appellant asserted in his letter that he had not received the Breakdown of Costs letter from the department dated June 10, 2000. He asserted that he only became aware of the denial of costs in a letter from his consultant dated July 14, 2000 and after reviewing a bill from his bank on August 15, 2000. He then determined that he would need to file the appeal himself. The appeal was dated September 10, 2000 and received by the department on September 13, 2000.

APPLICABLE STATUTES AND CODE PROVISIONS

Wisconsin Statutes §101.02(6) provides, in part as follows:

(e) Any employer or other person interested either because of ownership in or occupation of any property affected by any such order, or otherwise, may petition for a hearing on the reasonableness of any order of the department in the manner provided in this subchapter.

(f) Such petition for hearing shall be by verified petition filed with the department, setting out specifically and in full detail the order upon which a hearing is desired and every reason why such order is unreasonable, and every issue to be considered by the department on the hearing. The petitioner shall be deemed to have finally waived all objections to any irregularities and illegalities in the order upon which a hearing is sought other than those set forth in the petition. All hearings of the department shall be open to the public.

Wisconsin Admin.Code COMM 47.53(1) emergency rule provides, in part, as follows:

(1) HEARINGS. (a) *General*. A responsible party, agent, consultant or consulting firm may request a hearing with the department, as specified in s. 101.02(6)(e), Stats., on any provision or decision made within the scope of this chapter except as specified in ss. Comm 47.03(2), 47.35(3) and par. (b) 2.
(b)(b) *Appeal requirements*. All appeals pursuant to this chapter shall be filed no later than 30 calendar days from the date of the decision being appealed, except that appeals from decisions issued between February 15, 2000, and June 30, 2000, shall be filed no later than 90 calendar days from the date of the decision being appealed. The department may make a determination not to proceed with a request for a hearing depending on the nature of or amount of the cost item being appealed. (emphasis added)

DISCUSSION

The appeal in this matter was filed with the department on September 13, 2000, the date it was received by the Office of Legal Counsel. The department's decision, which is the subject of the appeal, is dated June 10, 2000. The appeal in this matter was filed 95 days after the department's decision. The appeal provisions in §COMM 47.53(1)(b)(b), Wis. Adm. Code, state that "[a]ll appeals pursuant to this chapter shall be filed no later than 30 calendar days from the date of the decision being appealed, except that appeals from decisions issued between February 15, 2000 and June 30, 2000, shall be filed no later than 90 calendar days from the date of the decision being appealed." This time limit is set out in a notice of appeal rights sent to the appellant on the spreadsheet attached to the department's decision. The department filed a written Motion to Dismiss for Untimeliness on September 15, 2000 that was renewed orally at hearing.

The appellant filed a written objection to the department's original motion on October 10, 2000. In his letter the appellant asserted that he had not received the Breakdown of PECFA costs and the attached spreadsheet. He further asserted that he became aware of the denied costs on July 14, 2000 and decided to file the appeal on August 15, 2000. The date of the appeal by the appellant was September 10, 2000 and was received by the department on September 13, 2000.

At hearing, the department presented an Affidavit of Dorothy J. White who is identified in the document as the "Financial Manager of the PECFA Bureau." In her affidavit, Ms. White set forth that "in the normal and customary course of her employment" she sends out a Breakdown of Costs letter to claimants advising them of the eligibility of the amounts claimed. She further stated that on the final page of this document there is an explanation of the claimant's appeal rights. She asserts that on June 10, 2000 she mailed a copy of the Breakdown of PECFA costs to Mr. Dennis Budd at 2422 Monroe Street, Madison WI that contained a listing of the costs that

were determined by the department to be ineligible. She also states that the final page of the Breakdown contained an explanation of the appellant's appeal rights. No testimony or evidence was provided by the appellant to refute the assertions contained in Ms. White's Affidavit.

Mr. Budd's absence at hearing did not allow for him to provide testimony or other evidence in support of his objections to the Motion to Dismiss for Untimeliness beyond those contained in the letter previously received by the hearing office on October 10, 2000. The facts, as presented, are quite clear. The appeal was filed on September 13, 2000. The department's decision on this matter was dated and mailed on June 10, 2000. The appeal was filed 95 days after the department's decision. Wisconsin Admin. Code COMM 47.53(1)(b)(b) specifies that all appeals from decisions issued between February 15, 2000 and June 30, 2000, shall be filed no later than 90 calendar days from the date of the decision being appealed. The applicable statutes and code contain no exception to this requirement. The appellant states that he was aware of the need to file an appeal on July 14, 2000, 34 days after the decision of the department was mailed to him. He further points out in his October 10, 2000 letter that he again became aware of the need to file and actually made the decision to file an appeal on August 15, 2000, 66 days after the department mailed its decision. Either of these dates is well within the 90-day appeal period and provided adequate time for Mr. Budd to file his appeal. Yet in his letter objecting to the motion the appellant provided no insight into why the appeal was not dated and sent until 92 days after the department's decision and received by the department on the 95th day following the department's decision. Therefore, the claimant's argument that he did not have adequate notice of his appeal rights and that therefore good cause existed for his late appeal is without merit.

CONCLUSIONS OF LAW

The appeal in this matter was not filed with the department within the 90-day period following the date of the department's decision as required by the applicable section of administrative code.

FINAL DECISION

The department's Motion to Dismiss for Untimeliness is granted. Appellant's failure to appear at the scheduled hearing provides adequate grounds to grant the department's Motion to Dismiss for Failure to Appear and enter a default judgment in favor of the department.

NOTICE TO PARTIES

Request for Rehearing

This is a final agency decision under §227.48, Stats. If you believe this decision is based on a mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision and which you could not have discovered sooner through due diligence. To ask for a new hearing, send or deliver a written request to Rehearing Request, Department of Commerce, Office of Legal Counsel, 201 W. Washington Avenue, 6th Floor, PO Box 7970, Madison, WI 53707-7970. Rehearing requests may also be filed by fax at the following number: (608) 266-3447. Faxed rehearing requests received after 4:30 p.m. on a business day will be filed effective the next business day.

Send or fax a copy of your request for a new hearing to all the other parties named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the hearing examiner made and why it is important. Or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain how your request for a new hearing is based on either a mistake of fact or law or the discovery of new evidence which could not have been discovered through due diligence on your part, your request will have to be denied.

Your request for a new hearing must be received no later than 20 days after the mailing date of this decision as indicated below. Late requests cannot be granted. The process for asking for a new hearing is in Sec. 227.49 of the state statutes

Petition For Judicial Review

Petitions for judicial review must be filed no more than 30 days after the mailing date of this hearing decision as indicated below (or 30 days after a denial of rehearing, if you ask for one). The petition for judicial review must be served on the Secretary, Department of Commerce, Office of the Secretary, 201 W. Washington Avenue, 6th Floor, PO Box 7970, Madison, WI 53707-7970.

The petition for judicial review must also be served on the other "PARTIES IN INTEREST" and counsel named in this decision. The process for judicial review is described in Sec. 227.53 of the statutes.

Dated: _____

John A. Kisiel
Administrative Law Judge
Department of Commerce
PO Box 7838
Madison WI 53707-7970

copies to:

Dennis Budd
Budds Standard Inc
2422 Monroe St
Madison WI 53711-1905

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Joseph R. Thomas
Department of Commerce
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Date Mailed: _____
Mailed By: _____